

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:FS:HAR:POSTS-150283-01
JFLong

date: October 10, 2001

to: Revenue Agent David Berglund, LMSB 1123, Hartford, CT

from: Associate Area Counsel, LMSB, Area 1, Hartford, CT

subject: [REDACTED] (Income and Employment taxes for [REDACTED])

By memorandum dated September 17, 2001, we provided you with advice on obtaining consents to extend the statute of limitations for assessment. This memorandum supplements said advice. This memorandum should not be cited as precedent.

We recommend that the caption for the consent to extend the time for assessment for income tax (Form 872) should read: [REDACTED] (EIN XX-XXXXXXX), formerly [REDACTED] (EIN XX-XXXXXXX), as successor to [REDACTED] (EIN XX-XXXXXXX), formerly [REDACTED] (EIN XX-XXXXXXX), and as alternative agent under Temp. Treas. Reg. § 1.1502-77T(a)(4) for members of the [REDACTED] consolidated group.*

There should be an asterisk after "group". At the bottom of the form, type:

*This is with respect to the [REDACTED] consolidated group for the taxable year ended [REDACTED].

In regard to the employment tax (Form 10-SS), the caption should be styled:

[REDACTED] (EIN XX-XXXXXXX), formerly [REDACTED] (EIN XX-XXXXXXX), as successor in interest to [REDACTED] (EIN XX-XXXXXXX), formerly [REDACTED] (EIN XX-XXXXXXX).

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

Please call Joseph F. Long at (860) 290-4090 if you have any questions or require further assistance.

BRADFORD A. JOHNSON
Associate Area Counsel
(Large and Mid-Size Business)

(Signed) Joseph F. Long

By: _____
JOSEPH F. LONG
Attorney (LMSB)

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:FS:HAR:TL-N-2944-99
JFLong

date: September 17, 2001

to: Revenue Agent David Berglund, LMSB 1123, Hartford, CT

from: Associate Area Counsel, LMSB, Area 1, Hartford, CT

subject: [REDACTED] (Income and Employment taxes for [REDACTED])

This memorandum responds to your oral request for assistance received at a meeting on July 31, 2001. This memorandum should not be cited as precedent.

ISSUES

1. Who is the proper party to sign a consent to extend the statute of limitations for assessment (Form 872 - Consent to Extend the Time to Assess Income Tax) for the income tax liabilities (Form 1120L) of [REDACTED] for the taxable year ended [REDACTED]. UIL. No. 6501.08-10.

2. Who is the proper party to sign a consent to extend the statute of limitations for assessment (Form 10-SS - Consent to Extend the Time to Assess Employment Tax) for the employment tax liabilities (Forms 941 and 945) of [REDACTED] for the taxable periods ended [REDACTED], [REDACTED], [REDACTED] and the taxable year ended [REDACTED]. UIL. No. 6501.08-10.

CONCLUSIONS

1. It is our opinion that an officer of [REDACTED], formerly known as [REDACTED], is the proper party to execute the Form 872 for the taxable year ended [REDACTED].

2. It is our opinion that an officer of [REDACTED], formerly known as [REDACTED], is the proper party to execute the Form 10-SS for the taxable periods ended [REDACTED], [REDACTED], [REDACTED], [REDACTED] and the taxable year ended [REDACTED].

FACTS

██████████ ("██████████") was the common parent, (i.e., the highest tier domestic corporation), of a consolidated group for the group's tax years ended ██████████ through ██████████. In ██████████, pursuant to the provisions of Conn. Gen. Stat. Ann. § 33-393, ██████████ surrendered its corporate charter and reincorporated under the name ██████████ ("██████████"). ██████████' EIN remained the same as that of ██████████. Later in ██████████ ██████████ was contributed to a newly-formed holding company, ██████████ ("██████████"). ██████████ was the common parent of the new group that included ██████████ as one of its subsidiaries for the tax years beginning in ██████████ and continuing until ██████████. On that date, ██████████ went out of existence by merging into ██████████ in a transaction to which I.R.C. § 381 applies. Prior to ██████████ merger into ██████████, there was no agent designated under Treas. Reg. § 1.1502-77(d). On ██████████ ██████████ was sold to, and became a subsidiary of ██████████ ██████████ ("██████████"). ██████████ was then renamed ██████████ ("██████████").^{1/}

DISCUSSION

In general, I.R.C. § 6501(a) provides that the Service has three years from the date a tax return is filed to assess additional tax liabilities.^{2/} In addition, under I.R.C. § 6501(c)(4), the Service and a taxpayer may consent in writing to an extension of the time for making an assessment, if the consent is executed before the expiration of the normal period of assessment, or the extension date agreed upon in a prior valid extension agreement between the parties.

I.R.C. § 6061 provides that any return, statement or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations. The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents to extend the time to assess tax. Accordingly, the Service applies the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

^{1/} Corporate structure charts provided by the taxpayer are attached here to as Exhibit A.

^{2/} Returns filed before their due date are deemed filed on the last date for filing.

In general, the common parent is the sole agent for each member of the group,^{3/} duly authorized to act in its own name in all matters relating to the income tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent, in its name, will give waivers, and any waiver so given shall be considered as having also been given or executed by each subsidiary in the consolidated group. Treas. Reg. § 1.1502-77(a). However, this general rule that the common parent is the sole agent for the group will not apply under certain circumstances, such as when the common parent goes out of existence. Treas. Reg. § 1.1502-77(d). It is therefore critical to determine if, and when, Life went out of existence.

The first question is whether [REDACTED] went out of existence as a result of the [REDACTED] transaction in which it surrendered its corporate charter and reincorporated under the name [REDACTED]. In our opinion, [REDACTED] did not go out of existence as a result of this transaction. Pursuant to the provisions of Conn. Gen. Stat. Ann. § 33-393, [REDACTED] surrendered its corporate charter and reincorporated under the name [REDACTED]. Conn. Gen. Stat. Ann. § 33-393(d) states that, upon the effectiveness of this reincorporation, the corporation ceases to be a specially chartered corporation, but otherwise continues in existence. Conn. Gen. Stat. Ann. § 33-393(e) further states that, for purposes of § 33-373, reincorporation is equivalent to an amendment of the certificate of incorporation. The above § 33-393(d) language stating that the corporation "otherwise continued in existence" as well as the above § 33-373(e) language stating that the "reincorporation is equivalent to an amendment of the certificate of incorporation" indicate that [REDACTED] did not go out of existence under Connecticut law upon surrendering its corporate charter and reincorporating under the name [REDACTED]. Furthermore, the fact that [REDACTED] EIN remained the same as [REDACTED]'s lends support to such a conclusion.

Later in [REDACTED], [REDACTED] was contributed to a new holding company, [REDACTED]. [REDACTED] was the common parent of the new group that included [REDACTED] as one of its subsidiaries until [REDACTED]. On that date, [REDACTED] went out of existence by merging into [REDACTED] in a transaction to which I.R.C. § 381

^{3/} The consolidated return regulations do not apply to employment taxes.

applies.^{4/} On [REDACTED], [REDACTED] was sold to, and became a subsidiary of [REDACTED]. [REDACTED] was then renamed [REDACTED].

Since [REDACTED] went out of existence on [REDACTED], it is no longer the sole agent for the group under Treas. Reg. § 1.1502-77(a). See Treas. Reg. § 1.1502-77(d). And although Treas. Reg. § 1.1502-77(d) allows the common parent to designate, subject to approval of the Service, another member to act in its place, [REDACTED] did not make such a designation. This regulation also provides that when, as here, the common parent makes no designation for a member to act in its place, the remaining members of the group for a consolidated return year may designate a member to act as the new agent. This power is seldom used because it is unwieldy and impractical except in groups with few members.^{5/}

Who then can extend the statute of limitations for assessment of the income tax liabilities? For an answer to this enigma we must turn to Temp. Reg. § 1.1502-77T.^{6/} This regulation was enacted to provide flexibility to both the taxpayer and the Service to choosing among several possible alternative agents. It provides that a waiver of the statute of limitations may be given by any of the following corporations which will be deemed to be the agent for the group:

^{4/} I.R.C. § 381(a) applies to an acquisition of assets of a corporation by another corporation in a distribution to the corporation to which I.R.C. § 332 (relating to liquidations of subsidiaries) applies; or in a transfer to which I.R.C. § 361 (relating to non recognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraphs (A), (C), (D), (F), or (G) of § 368(a)(1).

^{5/} Because of these problems it was eliminated in the regulations issued in September of 2000. See, Notice of Proposed Rule making to Amend § 1.1502-77 (REG-103805-99), 65 Fed. Reg. 57755 (September 26, 2000); 2000-42 I.R.B. 376 (October 16, 2000).

^{6/} This regulation is controlling for the year 1995 since the proposed regulations apply to consolidated return years beginning after the date of publication in the final regulations in the Federal Register. See Notice of Proposed Rule making to Amend § 1.1502-77 (REG-103805-99), 65 Fed. Reg. 57755 (September 26, 2000); 2000-42 I.R.B. 376 (October 16, 2000).

1. The common parent of the group for all or any part of the year to which the waiver applies;
2. A successor to the former common parent in a transaction to which section 381(a) applies;
3. The agent designated by the group; or,
4. If the group remains in existence under Treas. Reg. § 1.1502-75(d)(2) or (3), the common parent at the time the waiver is given.^{2/}

Based on the forgoing, it is our opinion that [REDACTED] is an alternative agent under Temp. Treas. Reg. § 1.1502-77T(a)(2) as successor to the former common parent, [REDACTED], in a transaction to which I.R.C. § 381 applies. As such, an officer of [REDACTED] can execute the Form 872. We recommend this form should be captioned, "[REDACTED], formerly known as [REDACTED], as Alternative agent (or, as successor to [REDACTED], formerly known as [REDACTED] *", and should include the EIN of [REDACTED], which was also the EIN of [REDACTED]. We believe the Form 872 caption should also include the above asterisk (*) to refer to the following information that should be provided on the bottom of the front page of the form: "With respect to the consolidated tax liability of [REDACTED]".

As previously mentioned, the consolidated return regulations do not apply to employment taxes. Therefore, the alternative agent rules contained in Temp. Treas. Reg. § 1.1592-77T do not apply. However, since [REDACTED] into [REDACTED], it is our opinion that an officer of [REDACTED] can also execute the Form SS-10 for the employment tax liabilities. But we recommend the Form SS-10 in this case should be captioned, "[REDACTED], formerly known as [REDACTED], as successor to [REDACTED], formerly known as [REDACTED]", and should include the EIN of [REDACTED], which was also the EIN of [REDACTED].

We are simultaneously submitting this memorandum to the National Office for post-review and any guidance they may deem appropriate. Consequently, you should not take any action based on the advice contained herein during the 10-day review period. We will inform you of any modification or suggestions, and, if necessary, we will send you a supplemental memorandum incorporating any such recommendation.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney-client privilege. If

^{2/} See Temp. Treas. Reg. § 1.1502-77T(a)(4).

